NO. 14-17-00098-CR

IN THE
COURT OF APPEALS FOR THE
FOURTEENTH JUDICIAL DISTRICT OF TEXAS
AT HOUSTON

MARC WAKEFIELD DUNHAM

V.

THE STATE OF TEXAS

Appealed from the
County Criminal Court at Law No. 6
of Harris County, Texas
Cause Number 2109329

BRIEF FOR APPELLANT

Josh Schaffer
State Bar No. 24037439

1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com

Attorney for Appellant
MARC WAKEFIELD DUNHAM

ORAL ARGUMENT REQUESTED

IDENTITY OF THE PARTIES

Appellant:	Marc Wakefield Dunham 8022 E. Laurel St. Mesa, AZ 85207
Trial Counsel:	L. Jeth Jones, II 1 Greenway Plaza, Ste. 100 Houston, TX 77046
Appellate Counsel:	Josh Schaffer 1021 Main, Ste. 1440 Houston, TX 77002
Appellee:	The State of Texas
Trial Counsel:	Valerie Turner 1201 Franklin Houston, TX 77002
Appellate Counsel:	Eric Kugler 1201 Franklin Houston, TX 77002
Trial Judge:	Honorable Larry Standley 1201 Franklin Houston, TX 77002

SUBJECT INDEX

Page

INDEX OF AUTHORITIES

Cases **Page**

Page

Statutory Provisions

Page

Miscellaneous

STATEMENT OF THE CASE

Appellant pled not guilty to Class A misdemeanor deceptive business practice in cause number 2109329 in the County Criminal Court at Law Number 6 of Harris County before the Honorable Larry Standley. A jury convicted him, and the court assessed punishment at one year in the county jail and a $4,000 fine on January 27, 2017. L. Jeth Jones, II, represented him at trial.

Appellant presents two issues on appeal.

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument because there is a dearth of caselaw addressing the criminal offense of deceptive trade practice, and this case presents important issues involving legal sufficiency of the evidence and jury charge error.

ISSUES PRESENTED

1. Whether the evidence is legally insufficient to sustain appellant's conviction for deceptive business practice.

2. Whether the trial court reversibly erred in refusing to instruct the jury in the charge that it must agree unanimously that appellant committed the same specific act of deceptive business practice, and in authorizing it to convict him even if it did not agree unanimously on which specific act he committed.

STATEMENT OF FACTS

A. The Information

The information alleged that, on or about June 15, 2016, appellant, while in the course of business, intentionally, knowingly, and recklessly committed Class A misdemeanor deceptive business practice three different ways (C.R. 8):

1. he represented that a commodity or service was of a particular style, grade, or model if it was another by giving the impression to Eloise Moody, the complainant, that an alarm system was a Central Security Group alarm system when it was actually a Capital Connect alarm system; "and/or"
2. he represented the price of property or service falsely or in a way tending to mislead by telling Moody that a new alarm installation would be free when it required that she sign a new contract at an additional cost; "and/or"
3. he made a materially false or misleading statement in connection with the purchase or sale of property or service by telling Moody that a new alarm system installation would be free when it required that she sign a new contract at an additional cost.

B. The State's Case

Eloise Moody, age 81, lived alone in a house that was equipped with a

Central Security Group (Central) alarm system (3 R.R. 22-23, 25). She paid about $22 per month for monitoring service (3 R.R. 31).

Appellant, who was not wearing a uniform, rang Moody's doorbell on June 15, 2016 (3 R.R. 24, 28). He said, "I'm here to update your security," and that he could put a light on the sign in her yard to make it more visible from the street (3 R.R. 24-25). She assumed that he worked for Central, her alarm company, although he never stated that he did; and she did not request his identification (3 R.R. 26, 28, 78-79, 104). He did not discuss pricing at her front door (3 R.R. 29).

Moody allowed appellant to enter her house to determine what type of alarm panel she had (3 R.R. 26-27).[1] He showed her a medical Life Alert button and another button for her keychain that would activate and deactivate her alarm remotely (3 R.R. 29). Her Central system had neither feature (3 R.R. 60, 93). He offered to upgrade her system to a new wireless one and said that a technician was down the street (3 R.R. 34, 37). The installation and new equipment were free, but she would have to pay for monitoring (3 R.R. 29, 31, 53, 60-61).

Appellant called Central for Moody, told her how to cancel her contract, and said to tell them that he was her son if they gave her a hard time about canceling (3 R.R. 30, 35). She spoke to a representative from Central, who said that she was not authorized to cancel (3 R.R. 36). She believed that she would have to continue

[1] Moody would not have allowed appellant inside her house had she known that he did not work for Central because she already had an alarm system (3 R.R. 34).

paying Central because she could not cancel the contract (3 R.R. 52). During that phone call she first realized that appellant did not work for Central (3 R.R. 36).

Appellant showed Moody a Capital Connect (Capital) alarm monitoring agreement with a $55.99 monthly fee (3 R.R. 36, 44). She signed the monitoring agreement and an alarm upgrade agreement, and a technician arrived to install the new system (3 R.R. 37-45; 6 R.R. 3-18; SX 1, 2).[2] The upgrade agreement stated that Capital was not related to or connected with her current alarm company and that she was responsible for canceling that service (6 R.R. 4; SX 1). The monitoring agreement stated that the new equipment and installation were free and that she would pay a $55.99 monthly monitoring fee (6 R.R. 11-12; SX 2). She asserted that she did not know about the price increase when she signed the contract, that she first learned about it when her daughter read the contract, and that she would not have signed the contract had she known that the monthly cost would be twice as much as her current system (3 R.R. 52-53, 62, 66).

Appellant called Capital so a representative could discuss the installation with Moody (3 R.R. 53-54). That person explained the procedure, and Moody understood that she worked with appellant's company. The jury heard an audio recording of that phone conversation, in which Moody said that she understood that she would pay a $55 monthly monitoring fee but no up-front costs (3 R.R. 79-

[2] Moody told appellant that her daughter had to review the contract before she signed it, but she signed it without calling her daughter (3 R.R. 63, 101).

84; 6 R.R. 135-36; DX 2). In fact, the new Capital system was installed at no up-front cost to her, and she did not pay for any of the new equipment (3 R.R. 68-69, 87-88). She understood that the monthly monitoring fee would be more than her old Central system (3 R.R. 88). When appellant left her house that day, the new Capital system worked as he promised it would (3 R.R. 89-90).

Moody regretted her decision to change alarm companies and told her daughter about it two days later (3 R.R. 56). Her daughter canceled the contract, and Capital removed the system (3 R.R. 57). Her daughter then arranged for Moody to have new service with ADT, which costs more than her old Central system (3 R.R. 58, 91, 97-98).

Moody called the police five days after meeting appellant to report "a possible scam" (3 R.R. 59, 157-59, 179). She gave them the signed agreements and appellant's business card, which identified that he worked for Capital; and she admitted giving Capital verbal authorization to install the system and signing the contract (3 R.R. 160, 187-88). The police identified appellant by using a license plate number that a witness obtained from a car that was registered to him (3 R.R. 164-65). Moody identified him in a photospread (3 R.R. 65-66, 175-76). The police learned that Moody canceled the Capital contract and suffered no loss (3 R.R. 186-87). However, they did not test her new Capital system to determine if it worked properly, nor did they determine if the it was superior to the old Central

system (3 R.R. 182-85). They did not listen to the audio recording of Moody's phone conversation with the Capital representative before they filed the criminal charge against appellant (3 R.R. 188).

The State also introduced evidence of alleged extraneous misconduct regarding appellant's attempts to sell alarm systems to James Zike, age 70, on June 15, 2016, and to Andrew Davis, age 80, on July 13, 2016 (4 R.R. 11-58, 64-88).

C. The Charge

In the application paragraph of the charge, the court instructed the jury that it could convict appellant if it found beyond a reasonable doubt that he committed deceptive business practice either (1) by representing that a commodity or service was of a particular style, grade, or model when it was another; or (2) by representing the price of property or a service falsely or in a way tending to mislead; or (3) by making a materially false or misleading statement in connection with the purchase or sale of property or a service (C.R. 87).

The court instructed the jury, "In order to find the defendant guilty you must each believe beyond a reasonable doubt that the Defendant committed at least one of the three allegations as stated above, but you need not be unanimous as to which of the three allegations was proven" (C.R. 88) (emphasis added). Appellant objected to the "unanimity problem" on due process grounds and requested separate verdicts instead of a general verdict (4 R.R. 103-08).

D. The Arguments

The prosecutor argued during summation that appellant committed deceptive business practice three different ways but that the jurors did not have to agree on which way he committed the offense, as long as all of them believed that he committed it at least one of the three ways (4 R.R. 115-17).

The prosecutor asserted that appellant represented that a commodity or service was of a particular style, grade, or model when it was another by giving Moody the impression that he worked for Central and was there to update her Central system, when he was an independent contractor and gave her a contract for a Capital system. Appellant represented the price of property or a service falsely or in a way tending to mislead, and he made a materially false or misleading statement in connection with the purchase or sale of property or a service, by telling Moody that installation of the new system would be free when it required that she sign a five-year contract at a greater cost. The prosecutor also emphasized that appellant engaged in this conduct purposely and repeatedly with more than one person, including Zike and Davis.

Defense counsel argued that Moody knew that appellant worked for Capital when she signed the contract and before installation (4 R.R. 121). On the phone with Capital, she acknowledged that she was changing companies with a new contract and a new monthly fee (4 R.R. 121-22). She received the product that she

contracted to receive, and appellant never discussed any model, style, or grade (4 R.R. 122-23). It was undisputed that the new equipment and installation were free, and the $55 monthly monitoring fee that appellant promised is what appeared in the contract (4 R.R. 124-25, 128). To be a crime, the price needed to differ from what appellant quoted, but there was no false representation regarding price (4 R.R. 125-27). Moody had no damages, canceled the Capital system at no cost, and obtained a new ADT system that she enjoys more than her old Central system (4 R.R. 125-26). Appellant never said that he was with a different company, and Moody never asked him to leave her house (4 R.R. 129). Her erroneous assumptions about him were not proof that he made any misrepresentations (4 R.R. 130). Most important, when she signed the contract, she knew that she was receiving a Capital system, and she knew the price (4 R.R. 132). Counsel asked the jury not to convict appellant for being an effective salesman (4 R.R. 129).

E. The Verdict And Sentence

The jury deliberated five hours and convicted appellant of deceptive business practice as alleged in the information (C.R. 89; 5 R.R. 6-7).

Appellant elected the court for punishment and filed a motion for probation (C.R. 49-50). The court noted that it is not permitted to transfer a misdemeanor probation to Arizona, where appellant lives (5 R.R. 48). It assessed the maximum punishment of one year in jail and a $4,000 fine (C.R. 91-92; 5 R.R. 53).

SUMMARY OF THE ARGUMENT

The evidence is legally insufficient to sustain appellant's conviction for deceptive business practice. There was no evidence that he intentionally, knowingly, or recklessly represented that he was selling Eloise Moody, the complainant, a Central Security Group alarm system. Moody admitted that appellant never stated that he worked for Central; she just assumed that he did. He never misrepresented for whom he worked, and the only representations that he affirmatively made regarding a commodity or service were accurate. Furthermore, there was no evidence that he intentionally, knowingly, or recklessly represented the price of property or service falsely or in a way tending to mislead; nor was there any evidence that he made a materially false or misleading statement in connection with the purchase or sale of property or service. Thus, this Court must reverse the judgment and issue an appellate acquittal

The trial court reversibly erred in refusing to instruct the jury in the charge that it must agree unanimously that appellant committed the same specific act of deceptive business practice, and in authorizing it to convict him even if it did not agree unanimously on which specific act he committed. The State alleged three separate criminal offenses of deceptive business practice in one paragraph within one count of one information. The trial court failed to instruct the jurors that they had to unanimously agree as to which single, specific act he committed. To the

contrary, the court instructed the jurors that they could convict even if they did not agree as to which of the three alleged acts he committed. The prosecutor emphasized the charge error during summation by arguing that the jurors did not have to agree on which way he committed the offense, as long as they all believed that he committed it at least one of the three ways. Appellant preserved this issue for appeal, and the error resulted in "some harm" to his rights because this Court cannot determine if the jury reached a unanimous verdict as to which criminal act he committed. The Court must reverse the judgment and remand for a new trial.

FIRST POINT OF ERROR

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR DECEPTIVE BUSINESS PRACTICE.

STATEMENT OF FACTS

The pertinent facts are set forth supra at pages 2-6.

ARGUMENT AND AUTHORITIES

A. Standard Of Review

A challenge to the legal sufficiency of the evidence requires the appellate court to consider the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); Byrd v. State, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011). A court may hold

that evidence is insufficient under this standard in two circumstances: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense, or (2) the evidence conclusively establishes a reasonable doubt that the defendant committed the offense. Jackson, 443 U.S. at 314, 320.

The State may prove the defendant's criminal culpability by either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. Gardner v. State, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009). Both the requisite culpable mental state and the prohibited act must be proven to convict the defendant. Bounds v. State, 355 S.W.3d 252, 255 (Tex. App.—Houston [1st Dist.] 2011, no pet.). A culpable mental state can be inferred from the acts, words, and conduct of the defendant. Patrick v. State, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995). A jury may consider events occurring before, during, and after the offense. In re I.L., 389 S.W.3d 445, 456 (Tex. App.—El Paso 2012, no pet.).

Because of the dearth of authority related to section 32.42 of the Penal Code, this Court should engage in statutory interpretation to determine whether the evidence was sufficient to establish that appellant committed the charged offense. In construing a statute, an appellate court must apply the plain meaning of its words unless the language of the statute is ambiguous or would lead to absurd results. Boykin v. State, 818 S.W.2d 782, 785-86 & 786 n.4 (Tex. Crim. App. 1991). Use of dictionary definitions of words contained in the statutory language

is part of the "plain meaning" analysis that an appellate court initially conducts to determine whether the statute in question is ambiguous. Lane v. State, 933 S.W.2d 504, 515 n.12 (Tex. Crim. App. 1996). When the words of a statute are ambiguous, courts may look to extratextual factors to try to ascertain the statute's meaning. Boykin, 818 at 785-86. The provisions of the Penal Code "shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code." TEX. PENAL CODE §1.05(a) (West 2016).

B. The evidence did not establish that appellant intentionally, knowingly, or recklessly represented that a commodity or service was of a particular style, grade, or model when it was another.

The information alleged that appellant first committed deceptive business practice by intentionally, knowingly, or recklessly representing that a commodity or service was of a particular style, grade, or model if it was another by giving the impression to Eloise Moody, the complainant, that an alarm system was a Central Security Group alarm system when it was actually a Capital Connect alarm system (C.R. 8).

A person commits an offense if in the course of business he commits the deceptive business practice of representing that a commodity or service is of a particular style, grade, or model if it is of another. TEX. PENAL CODE §32.42(b)(7) (West 2016). For the purpose of this offense, "business" includes trade and commerce and advertising, selling, and buying service or property. Id. at

§32.42(a)(2). "Commodity" means any tangible or intangible personal property. Id. at §32.42(a)(3).

At the very least, the State was required to present evidence of circumstances from which a rational jury could infer that appellant acted recklessly—that is, that he was aware of but consciously disregarded a substantial and unjustifiable risk that circumstances surrounding his conduct exist. See TEX. PENAL CODE §6.03(c). To determine whether conduct is reckless, courts must look to: (1) whether the act, when viewed objectively at the time of its commission, created a "substantial and unjustifiable" risk of the type of harm that occurred; (2) whether that risk was of such a magnitude that disregard of it constituted a gross deviation from the standard of care that a reasonable person would have exercised in the same situation; (3) whether the defendant was consciously aware of that risk; and (4) whether the defendant consciously disregarded that risk. Bounds, 355 S.W.3d at 256. "In other words, the State was required to prove that appellant 'actually fore[saw] the risk and consciously decided to ignore it.'" Id. (quoting Williams v. State, 235 S.W.3d 742, 751-52 (Tex. Crim. App. 2007) (explaining that "devil may care" or "not give a damn" attitude raises conduct from criminal negligence to recklessness)).

The evidence clearly established that appellant was "in the course of business" when he interacted with Moody because he was selling the service and

property of residential alarm systems door-to-door. The equipment that he offered to install was a "commodity" because it was tangible property. The alarm monitoring that he offered to sell her constituted a "service."

The disputed issue was whether appellant, at a minimum, recklessly represented that the equipment or the monitoring service were of a particular style, grade, or model when they were, in fact, of another. The Legislature did not define the terms "representing," "style," "grade," or "model" as they relate to this statute; and no appellate court has done so.[3]

A "representation" is defined as "a presentation of fact—either by words or by conduct—made to induce someone to act, especially to enter a contract." Black's Law Dictionary, 540 (Pocket ed., 1996). In the context of a commodity or service, "style" is defined as "a distinctive or characteristic manner." The New Merriam-Webster Dictionary, 713 (1989 ed.). In this context, "grade" is defined as "a class of . . . things of the same rank or quality," id. at 325; and "model" is defined as "structural design." Id. at 471.

Using these ordinary dictionary definitions to determine the plain meaning of the statute, the Legislature intended that a person commits the offense of

[3] The First Court of Appeals addressed a challenge to the legal sufficiency of the evidence in a prosecution under subsection 32.42(b)(7) in Agbogun v. State, 756 S.W.2d 1, 2-3 (Tex. App.—Houston [1st Dist.] 1988, no pet.). It affirmed the conviction of a pharmacist who filled a prescription for a brand-name drug by substituting a generic drug but applying a label to the bottle for the brand-name drug. Unfortunately, the court of appeals did not provide any guidelines for interpreting the statute that would apply to appellant's case.

deceptive business practice under section (b)(7) by:

(1) presenting as fact, either by words or conduct;

(2) that any tangible or intangible personal property or service;

(3) is of a particular

(a) distinctive or characteristic manner,

(b) class of things of the same rank or quality, or

(c) structural design;

(4) if the property or service is of another; and

(5) to induce someone to act, especially to enter a contract.

Applying that statutory interpretation to appellant's case, this Court first must determine whether appellant made any "representations" that the alarm system he offered to sell Moody was of any particular style, grade, or model. If the Court concludes that he made such a representation, it then must determine if the system, in fact, was a different style, grade, or model.

The State alleged that appellant made a "representation" by "giving the impression" to Moody that he was selling her a Central alarm system. The State neither alleged nor proved any words or conduct by appellant to Moody "presenting as a fact" that he would install a Central alarm system. To the contrary, Moody admitted that appellant never stated that he worked for Central; she just assumed that he did (3 R.R. 26, 28, 78-79, 104). She knew that she was

canceling her service with Central to begin a new monitoring service with a different company (3 R.R. 30-36). As she attempted to cancel her Central service, she knew that appellant did not work for Central (3 R.R. 36). Appellant presented her with a Capital alarm monitoring agreement and an alarm upgrade agreement, which she signed and initialed (3 R.R. 37-45; 6 R.R. 3-18; SX 1, 2). The upgrade agreement stated that Capital was not related to or connected with her current alarm company and that she was responsible for canceling that service (6 R.R. 4; SX 1). She discussed the installation in a recorded phone call with a Capital representative, who explained the procedure and whom Moody understood worked with appellant's company (3 R.R. 53-54). Moody told the Capital representative that she understood that the monthly monitoring fee would be more than her old Central system (3 R.R. 88). Thus, appellant did not "represent" by words or conduct that he was selling Moody a Central alarm system. To the contrary, he never misrepresented for whom he worked, and she knew that she was changing her alarm service from Central to Capital when she executed the contract.

The only affirmative representations that appellant made regarding a commodity or service were accurate. He told Moody that the new equipment and installation were free, which was true (3 R.R. 29, 60-61, 68-69, 87-89). He told her that the new system would be wireless, which was true (3 R.R. 34, 60-61). He told her that she had to cancel her contract with Central, which was true (35). He

presented her with a Capital contract that stated that the equipment and installation were free, that she would pay $55.99 per month for monitoring, and that she was responsible for canceling her current service, all of which were true (3 R.R. 36-45, 85; 6 R.R. 3-18; SX 1, 2). The new alarm system worked when appellant left her home, just as he said it would (3 R.R. 89-90).

Even if the State arguably proved that appellant committed a prohibited act—which he does not concede—there is no evidence, or merely a modicum of evidence, that he acted with a culpable mental state. See Bounds, 355 S.W.3d at 255-56 (evidence legally insufficient to establish that defendant had culpable mental state to commit deceptive business practice). In conclusion, the evidence is legally insufficient to establish that he recklessly represented that a commodity or service was of a particular style, grade, or model when it was another.

C. The evidence did not establish that appellant intentionally, knowingly, or recklessly represented the price of property or a service falsely or in a way tending to mislead.

The information next alleged that appellant committed deceptive business practice by intentionally, knowingly, or recklessly representing the price of property or service falsely or in a way tending to mislead by telling Moody that a new alarm installation would be free when it required that she sign a new contract at an additional cost (C.R. 8).

A person commits an offense if in the course of business he commits the

deceptive business practice of representing the price of property or service falsely or in a way tending to mislead. TEX. PENAL CODE §32.42(b)(9) (West 2016).

The evidence clearly established that appellant was "in the course of business" because he was selling residential alarm systems door-to-door. The disputed issue was whether appellant intentionally, knowingly, or recklessly represented the price of (1) property or (2) service falsely or in a way tending to mislead.

Appellant told Moody that he was there to update her alarm system (3 R.R. 24). He did not discuss the price of "updating" her system at the front door (3 R.R. 29). Once inside her home, he told her that the new equipment and installation were free (3 R.R. 29, 60-61, 68-69, 87-89). His representation that the equipment and installation were free was accurate, as she admittedly paid no up-front cost for either, and she understood that to be the terms of the agreement when she signed it (3 R.R. 68-69, 85-88; DX 2-3). The first time he mentioned a cost to her, which was *before* she decided to sign the contract, he told her that the monthly cost of monitoring the new system could be in the range of $70 (3 R.R. 31). In fact, the contract provided that she would pay a monthly monitoring fee of $55.99 (3 R.R. 6 R.R. 3-18; SX 1, 2). She admittedly understood that she would pay that fee when she entered into the agreement and that it would be more than she was paying for her Central system (3 R.R. 85, 88; DX 2-3). Thus, appellant did not "represent" by

words or conduct the price of property or a service falsely or in a way tending to mislead. To the contrary, he accurately and unequivocally represented that the new equipment and installation would be free but also that there would be a monthly monitoring fee of $55.99.

In conclusion, the evidence was legally insufficient to establish that appellant recklessly represented the price of property or a service falsely or in a way tending to mislead.

D. The evidence did not establish that appellant intentionally, knowingly, or recklessly made a materially false or misleading statement in connection with the purchase or sale of property or a service.

The information finally alleged that appellant committed deceptive business practice by intentionally, knowingly, or recklessly making a materially false or misleading statement in connection with the purchase or sale of property or service by telling Moody that a new alarm system installation would be free when it required that she sign a new contract at an additional cost (C.R. 8).

A person commits an offense if in the course of business he commits the deceptive business practice of making a materially false or misleading statement in connection with the purchase or sale of property or service. TEX. PENAL CODE §32.42(b)(12)(B) (West 2016). "[T]he statute speaks in terms of the evil to be cured, i.e., to prevent 'materially false or misleading statements' from being used in connection with the purchase or sale of property or services." Ely v. State,

S.W.2d 416, 419 (Tex. Crim. App. 1979). "[T]he required culpable mental state must attach to the proscribed act at the time the conduct is engaged in." Id. at 420. This particular subsection requires that the culpable mental state attach to the making of the false or misleading statement "at the time of 'the purchase or sale of property or service.' This is a necessary implication of the phrase 'in connection with.' . . . This interpretation of the statute eliminates [the] concern that a businessman may make an honest representation at the time of the sale which subsequent business conditions renders objectively false at the time performance is required." Id. "[W]hat is prohibited is false representation of material facts relevant to the purchase or sale of property or service." Id.

The evidence clearly established that appellant was "in the course of business" because he was selling residential alarm systems door-to-door. The disputed issue was whether appellant recklessly made a materially false or misleading statement in connection with his offer to sell property or service. As with the allegation that he represented the price of property or service falsely or in a way tending to mislead, the evidence was insufficient to establish that he made a materially false or misleading statement by telling Moody that a new alarm system installation would be free when it required that she sign a new contract at an additional cost. To the contrary, he accurately and unequivocally represented that the new equipment and installation would be free but also that there would be a

monthly monitoring fee of $55.99.

Accordingly, the evidence was legally insufficient to establish that appellant committed the offense of deceptive business practice in any of three alleged ways. This Court must reverse the judgment and issue an appellate acquittal.

SECOND POINT OF ERROR

THE TRIAL COURT REVERSIBLY ERRED IN REFUSING TO INSTRUCT THE JURY IN THE CHARGE THAT IT MUST AGREE UNANIMOUSLY THAT APPELLANT COMMITTED THE SAME SPECIFIC ACT OF DECEPTIVE TRADE PRACTICE, AND IN AUTHORIZING IT TO CONVICT HIM EVEN IF IT DID NOT UNANIMOUSLY AGREE ON WHICH SPECIFIC ACT HE COMMITTED.

STATEMENT OF FACTS

The information alleged that appellant committed deceptive business practice in three different ways (C.R. 8):

1. he represented that a commodity or service was of a particular style, grade, or model if it was another by giving the impression to Eloise Moody, the complainant, that an alarm system was a Central Security Group alarm system when it was actually a Capital Connect alarm system; and/or
2. he represented the price of property or a service falsely or in a way tending to mislead by telling Moody that a new alarm installation would be free when it required that she sign a new contract at an

additional cost; and/or

3. he made a materially false or misleading statement in connection with the purchase or sale of property or a service by telling Moody that a new alarm system installation would be free when it required that she sign a new contract at an additional cost.

The prosecutor stated during the *voir dire* examination that there are three different ways she could prove the crime, that the jury only had to believe one of them, and that she did not have to prove all three of them (2 R.R. 58-60).

In the application paragraph of the charge, the trial court instructed the jury that it could convict appellant if it found beyond a reasonable doubt that he committed deceptive business practice either (1) by representing that a commodity or service was of a particular style, grade, or model when it was another; or (2) by representing the price of property or a service falsely or in a way tending to mislead; or (3) by making a materially false or misleading statement in connection with the purchase or sale of property or a service (C.R. 87).

Importantly, the trial court then instructed the jury, "In order to find the defendant guilty you must each believe beyond a reasonable doubt that the Defendant committed at least one of the three allegations as stated above, but you need not be unanimous as to which of the three allegations was proven" (C.R. 88) (emphasis added). Appellant objected to the "unanimity problem" on due process

grounds, and the court refused his request for separate verdict forms for each alleged act instead of a general verdict (4 R.R. 103-08).

The prosecutor argued during summation that appellant committed deceptive business practice three different ways but that the jurors did not have to agree on which way he committed the offense, as long as they all believed that he committed it at least one of the three ways (4 R.R. 115-17):

> "[N]ot all six of you have to agree as to which way that the State has proven this. Some of you may believe, well, I definitely think it's number one; and others of you may think, no, I think it's two or three. The bottom line is it doesn't matter, as long as every one of you six jurors believes that the defendant committed this offense one of these three ways."

The jury deliberated five hours and convicted appellant of deceptive business practice as alleged in the information (C.R. 89; 5 R.R. 6-7).

ARGUMENT AND AUTHORITIES

A. Standard of Review

When reviewing a jury charge issue, this Court first must determine whether error exists. Middleton v. State, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003). If it finds error, it then analyzes that error for harm. Id.

Jury charge error requires reversal when the defendant properly objected to the charge and there was "some harm" to his rights. Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985); Hutch v. State, 922 S.W.2d 166, 171 (Tex. Crim.

App. 1996). Where jury charge error is preserved for appeal, a new trial is required if the defendant suffered "*any* harm, regardless of degree." Arline v. State, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986) (emphasis in original). "Cases involving preserved charging error will be affirmed only if *no* harm has occurred." Id. To determine whether the defendant was harmed, this Court must consider the entire jury charge, the state of the evidence, including contested issues and weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole. Id. at 351-52.

B. Error existed in the jury charge because it allowed for a non-unanimous jury verdict.

The first step in a unanimity challenge is to examine the language of the statute to determine whether the Legislature intended to create multiple, separate offenses, or a single offense capable of being committed in several different ways. Jefferson v. State, 189 S.W.3d 305, 311 (Tex. Crim. App. 2006). The Court of Criminal Appeals "has been progressively moving in the direction of interpreting statutory language in terms of 'more offenses' and less in terms of 'manner and means,'" especially where the focus of the offense is on the defendant's conduct and not on the result of that conduct. Gandy v. State, 222 S.W.3d 525, 530 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (Legislature intended various forms of illegal dumping to be separate, distinct offenses, not different manner and means of committing same offense); see, e.g., Vick v. State, 991 S.W.2d 830, 833-34

(Tex. Crim. App. 1999) (Legislature intended various forms of aggravated sexual assault to be separate, distinct offenses, not different manner and means of committing same offense); Pizzo v. State, 235 S.W.3d 711, 716-19 (Tex. Crim. App. 2007) (jury unanimity required as to different types of conduct proscribed by indecency with child statute); Ngo v. State, 175 S.W.3d 738, 744 (Tex. Crim. App. 2005) (jury unanimity required as to different types of credit card abuse); Stuhler v. State, 218 S.W.3d 706, 718-19 (Tex. Crim. App. 2007) (jury unanimity required as to different types of injuries to child). If the focus or "gravamen" of the offense is the defendant's conduct, then different types of conduct are considered separate offenses. Huffman v. State, 267 S.W.3d 902, 907 (Tex. Crim. App. 2008).

The Legislature set forth 12 different deceptive business practices, each of which constitutes a criminal offense. TEX. PENAL CODE §32.42(b). Each one focuses on the defendant's conduct, not on a particular result of such conduct.[4] The best evidence that the Legislature intended each of these to be separate and distinct offenses is that it designated six of them as Class C misdemeanors if committed with criminal negligence but as Class A misdemeanors if committed intentionally, knowingly, or recklessly. However, it designated the other six as Class A misdemeanors regardless of the defendant's culpable mental state. Id. at

[4] The proscribed conduct in each of the enumerated statutory violations of the law includes (1) using, selling, or possessing; (2) selling; (3) taking; (4) selling; (5) passing off; (6) and (7) representing; (8) advertising; (9) representing; (10) making a statement; (11) conducting a contest; and (12) making a statement.

§§(c) and (d). Under this statutory framework, the Legislature clearly intended that these 12 separate deceptive business practices constitute distinct offenses, not different manner and means of committing the same offense.

The information charging appellant with deceptive business practice under section 32.42 of the Penal Code alleged three statutorily different criminal acts:

(1) representing that a commodity or service was of a particular style, grade, or model if it was another; TEX. PENAL CODE §32.42(b)(7);

(2) representing the price of property or service falsely or in a way tending to mislead; TEX. PENAL CODE §32.42(b)(9); and

(3) making a materially false or misleading statement in connection with the purchase or sale of property or service; TEX. PENAL CODE §32.42(b)(12)(B).

The State charged all three offenses in one paragraph within a single count in one information (C.R. 8). See TEX. CRIM. PROC. CODE art. 21.24(b) (West 2016) ("A count may contain as many separate paragraphs charging the same offense as necessary, but no paragraph may charge more than one offense."); see also Francis v. State, 36 S.W.3d 121, 126 (Tex. Crim. App. 2000) (Womack, J., concurring) ("Our law allows only one offense to be charged in each paragraph of an indictment, information, or complaint. Here, the State, having chosen to plead only one paragraph, was required to elect one incident on which to rely. This

requirement is not only essential to giving a defendant the requisite notice of the charge against which to defend, it helps assure that the jury's verdict will be unanimous."). In appellant's case, the State sought one conviction for the commission of one deceptive trade practice offense by proving any of three different criminal acts alleged three different ways within one paragraph.

"When the State charges different criminal acts, regardless of whether those acts constitute violations of the same or different statutory provisions, the jury must be instructed that it cannot return a guilty verdict unless it unanimously agrees upon the commission of any one of these criminal acts." Ngo, 175 S.W.3d at 744. "The unanimity requirement is undercut when a jury risks convicting the defendant of different acts, instead of agreeing on the same act for a conviction." Francis, 36 S.W.3d at 125.

In appellant's case, the trial court instructed the jury in the application section of the charge on three offenses disjunctively in three separate paragraphs (C.R. 87). Importantly, it also instructed the jury that it "need not be unanimous as to which of the three allegations was proven" (C.R. 88). Not only did the trial court fail to instruct the jury that it needed to be unanimous as to which criminal act appellant committed, but it affirmatively and erroneously instructed the jury that it *need not* be unanimous as to which of the three allegations was proven.

Jury unanimity is required in all criminal cases in Texas. See TEX. CRIM.

PROC. CODE art. 36.29(a), 37.02-37.04, 37.07 §2(a), 45.034-45.036. The unanimity requirement is a complement to and helps effectuate the beyond-a-reasonable-doubt standard of proof. United States v. Gipson, 553 F.2d 453, 457 n.7 (5th Cir. 1977). "Unanimity in this context means that each and every juror agrees that the defendant committed the same, single, specific criminal act." Ngo, 175 S.W.3d at 745. A unanimous verdict is more than a mere agreement on a violation of a statute; it ensures that the jury agrees on the factual elements underlying an offense. Francis, 36 S.W.3d at 125. A charge that allows for a non-unanimous verdict contains error. Cosio v. State, 353 S.W.3d 766, 774 (Tex. Crim. App. 2012).

Representing that a commodity or service was of a particular style, grade, or model if it was another is not the same specific criminal offense as representing the price of property or service falsely or in a way tending to mislead. Nor is either one of those acts the same specific criminal offense as making a materially false or misleading statement in connection with the purchase or sale of property or service. All three of these acts are deceptive business practice offenses, but they are not the same, specific deceptive business practice acts committed at the same time or with the same *mens rea* and the same *actus reus*.

Appellant could have forced the State to elect which specific act it was relying on for conviction, but such a request was not necessary to implement the

requirement of jury unanimity. Ngo, 175 S.W.3d at 748. "Nonetheless, the jury must reach a unanimous verdict on which single, specific criminal act the defendant committed." Id. The failure to request an election means that the jury may be instructed on several different criminal acts in the disjunctive, but it still must be instructed that it must unanimously agree on one specific criminal act. Id. Although appellant did not ask the State to elect one specific act, he requested separate verdict forms for each alleged act instead of one general verdict (4 R.R. 103-08).

A jury charge that authorizes a non-unanimous verdict concerning what specific criminal act the defendant committed constitutes error. Francis, 36 S.W.3d at 125; Ngo, 175 S.W.3d at 749. The jury charge in appellant's case was even more erroneous than the charges in Francis and Ngo because, in those cases, the failure to instruct the jury on the unanimity requirement created the *risk* that the jury "could well have been misled into believing that only its ultimate verdict of 'guilty' need be unanimous," Ngo, 175 S.W.3d at 749, whereas in appellant's case the jury was affirmatively and erroneously misled into believing that it "need not be unanimous as to which of the three allegations was proven" (C.R. 88).

C. Appellant suffered "some harm" when the jury was repeatedly told that it need not return a unanimous verdict.

Appellant preserved the charge error by objecting to the "unanimity problem" and requesting separate verdict forms for each alleged act instead of a

general verdict (4 R.R. 103-08). Thus, this Court must review the charge error for "*any* harm, regardless of degree." Arline, 721 S.W.2d at 351.

The record demonstrates that appellant suffered more than just "any" or "some" harm. The trial court not only failed to properly instruct the jury on the unanimity requirement but also affirmatively and erroneously instructed the jury that it *need not* be unanimous as to which specific criminal act appellant committed. Moreover, the prosecutor compounded the charge error by arguing at summation that the jurors did not have to agree on which way appellant committed the offense, as long as they all believed that he committed it at least one of the three ways alleged (4 R.R. 115-17):

> "[N]ot all six of you have to agree as to which way that the State has proven this. Some of you may believe, well, I definitely think it's number one; and others of you may think, no, I think it's two or three. The bottom line is it doesn't matter, as long as every one of you six jurors believes that the defendant committed this offense one of these three ways."

So both the trial court and the prosecutor affirmatively told the jury that it need not return a unanimous verdict.

In addition to the prosecutor's emphasis of the charge error, this was a closely contested case, as evidenced by five hours of jury deliberations (5 R.R. 6-7). Some jurors could have found appellant's defense to one or more of the three allegations persuasive while finding another one unpersuasive. For example, even

if five jurors believed that appellant only misrepresented the particular style, grade, or model of a commodity or service, but one juror believed instead that he only misrepresented the price of property or service falsely or in a way tending to mislead, then the verdict was not unanimous.

The absence of an effective unanimity instruction in the charge was not corrected elsewhere in the charge. Instead, the trial court's affirmatively erroneous instruction and the prosecutor's affirmatively erroneous argument that the jury could return a non-unanimous verdict compounded the harmful effect of the charge error. Given the state of the evidence, this Court cannot determine that the jury unanimously found appellant guilty of one specific offense of deceptive business practice. The Court of Criminal Appeals concluded that similar but unpreserved charge error caused egregious harm in Ngo. See also Hines v. State, 269 S.W.3d 209, 220-22 (Tex. App.—Texarkana 2008, pet. ref'd) (unpreserved jury charge error regarding unanimity caused egregious harm where prosecution emphasized error during summation). Here, preserved error caused just as much, if not more, harm than in Ngo. Accordingly, appellant's right to a unanimous jury verdict was violated, and this violation caused "some harm" to his rights. This Court must reverse the judgment and remand for a new trial.

CONCLUSION

This Court must reverse the judgment of conviction and issue an appellate acquittal or, alternatively, remand for a new trial.

Respectfully submitted,

/S/ Josh Schaffer
Josh Schaffer
State Bar No. 24037439
1021 Main, Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com

Attorney for Appellant
MARC WAKEFIELD DUNHAM

CERTIFICATE OF SERVICE

I served a copy of this brief on Eric Kugler, assistant district attorney for Harris County, by electronic service on September 29, 2017.

/S/ Josh Schaffer
Josh Schaffer

CERTIFICATE OF COMPLIANCE

I certify that, according to the word count of the computer program used to create this document, it contains 7,675 words, excluding the cover page, table of contents, table of authorities, certificate of service, and certificate of compliance.

/S/ Josh Schaffer
Josh Schaffer